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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20036

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Operator Communications, Inc.)
d/b/a Oncor Communications, Inc.)

CC Docket No. 96-45
File No. _____

EMERGENCY PETITION FOR PARTIAL)
WAIVER OF THE COMMISSION'S)
CALCULATION METHOD FOR UNIVERSAL)
SERVICE CONTRIBUTIONS)

National Telephone & Communications, Inc.)

CC Docket No. 96-45
DA 98-1301

PETITION FOR PARTIAL WAIVER OF THE)
UNIVERSAL SERVICE CONTRIBUTION)
REQUIREMENT UNDER SECTIONS 54.703,)
54.709 AND 54.711 OF THE COMMISSION'S)
RULES)

**EMERGENCY PETITION FOR PARTIAL WAIVER AND COMMENTS IN RESPONSE
TO NATIONAL TELEPHONE & COMMUNICATIONS, INC.'S REQUEST FOR PARTIAL
WAIVER**

Operator Communications, Inc. d/b/a Oncor Communications, Inc. ("Oncor"), by its attorneys and pursuant to Section 1.3 of the Commission's rules,¹ hereby requests to the extent necessary, partial waiver of the Commission's rules, policies and procedures for calculating Universal Service contributions. In addition, pursuant to Public Notice DA 98-1301,² Oncor hereby submits its comments in response to National Telephone &

¹47 C.F.R. § 1.3.

²Public Notice - National Telephone & Communications, Inc. Emergency Petition for Partial Waivers Pleading Cycle Established, CC Docket No. 96-45, DA 98-1301, released June 30, 1998

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Communications, Inc.'s ("NTC") petition for partial rule waiver of sections 54.703, 54.709 and 54.711 of the rules to allow NTC to exclude revenue attributable to a portion of its 1997 customer base for purposes of calculating its calendar year 1998 Universal Service contributions.³

INTRODUCTION

NTC's Petition raises a very important public interest issue regarding the method of calculating Universal Service contributions. Oncor first introduced this issue in its May 15, 1998 comments filed in CC Docket No. 96-45, DA 98-71.⁴ In response to that Public Notice, Oncor specifically addressed the methodology for calculating the Universal Service contribution and the substantive harm it is causing to smaller carriers who serve declining telecommunications market segments. It is this harm that now causes Oncor to file this Petition for Partial Waiver and Comments in response to NTC's similar petition.

While NTC requests waiver of sections 54.703, 54.709 and 54.711 of the Commission's rules, those regulations do not specifically mandate use of a carrier's prior year revenues to calculate current year Universal Service contributions. For example, while section 54.709(a) provides that "Contributions to the Universal Service support mechanisms shall be based on contributors' end-user telecommunications revenues and contribution factors determined quarterly by the Administrator," nothing in the rule addresses the time

³See Emergency Petition for Partial Waivers (CC Docket No. 96-45), filed by National Telephone & Communications, Inc. June 25, 1998.

⁴Comments of Operator Communications, Inc. In response to proposals to revise the methodology for determining universal service support, filed May 15, 1998.

period of the revenue figures to be used. Likewise nothing in the Commission's orders in CC Docket 96-45 addresses this issue either. Therefore Oncor's request is intended to encompass the Commission's authority to direct the Universal Service Administrative Corporation (*i.e.*, the entity created by the Commission to administer the Universal Service Fund) to allow carriers to calculate universal service contributions based on current year revenues rather than previous year revenues in circumstances where basing contributions on previous year revenues would impose undue economic hardship on the donors or where contributions based on previous year revenues would impede donor carriers' ability to compete in any telecommunications service market segment. In support therefore, Oncor states as follows:

THE METHODOLOGY FOR CALCULATING UNIVERSAL
SERVICE CONTRIBUTIONS DISCRIMINATES AGAINST AND
UNREASONABLY HARMS THOSE CARRIERS EXPERIENCING
DECLINING REVENUES. THE COMMISSION SHOULD GRANT
WAIVERS TO AVOID UNDUE HARM TO SUCH CARRIERS AND
THEIR CUSTOMERS AND SHOULD MODIFY THE PROCEDURES
FOR CALCULATING UNIVERSAL SERVICE CONTRIBUTIONS

In general, a party requesting waiver of the Commission's rules must demonstrate that good cause exists to justify the requested relief.⁵ Oncor meets this standard and, thus its requested partial waiver should be granted. Under the current Universal Service contribution rules, telecommunications carriers are required to report revenues on a semi-annual basis. Those revenue reports contained in the Universal Service contribution worksheets are used

⁵See 47 C.F.R. § 1.3. See also WAIT Radio v. FCC, 428 F.2d 1153 (D.C. Cir. 1969), cert. den. 409 U.S. 1027 (1972).

to calculate each telecommunications carrier's prospective contributions. In other words, carrier contributions are based upon revenues generated in previous periods. Where a carrier is enjoying growth, this causes no economic or competitive harm to the carrier. In fact, when a carrier is experiencing a high rate of growth, its Universal Service contribution as a percentage of its current gross revenue level may be significantly lower than the contribution factor. Where, however, a carrier's revenues are declining or even if its revenues are flat from year-to-year -- for whatever reasons, the effect of this "contribution lag" is to unduly penalize those carriers whose Universal Service contributions will be disproportionately large based upon their current revenue levels.

Oncor is a carrier whose business primarily involves operator-assisted interexchange service from aggregator locations, mainly public telephones. Oncor has seen its traffic levels and revenues decline substantially in recent years. For the first six months of 1997, Oncor's total revenue was approximately \$20,389,000. For the first six months of 1998, Oncor's total revenue was approximately \$11,121,000. This decline in revenue represents over a forty-five percent year-to-year decrease.

These declines in traffic and revenues primarily are the result of three factors: 1) growth of the prepaid calling card industry segment; 2) the dramatic increase in "dial around" calling (*i.e.* use of toll carriers other than the carrier serving the originating phone on a presubscribed basis, by dialing 10XXX, 1-800 or other access codes); and 3) increased use

of wireless telecommunications services such as cellular and PCS.⁶ Whatever the reason for the declining traffic and revenues, there is no doubt that Oncor is, and certain other carriers are -- or will be -- experiencing such declines. Because of the aforementioned factors, it is likely that the revenue levels of carriers providing presubscribed operator-assisted interexchange service from aggregator locations will continue to drop. Oncor's current monthly Universal Service contribution invoiced amount is approximately \$127,000. This amount represents 3.7% of a monthly pro rata portion of the revenues from the first half of 1997. However as a percentage of a monthly pro rata portion of Oncor's revenue from the first half of 1998, the Universal Service contribution represents 6.85% of Oncor's current revenues.

In considering the significance of these percentages, the Commission must take into account the thin operating margins that characterize the highly competitive interexchange telecommunications industry. While the difference between 6.85% and 3.70% may not appear significant at first blush, the difference represents an eighty-five percent increase. When viewed in these terms the negative effect of the Commission's current methodology becomes self-evident. Even if all carriers pass through to their customers the costs associated with their Universal Service contributions, costs that carriers such as Oncor pass

⁶In addition, Oncor sold a business unit at the beginning of 1998. The sale also contributes to the lower current year revenues. This also shows the inequity of the current calculation method. When a carrier divests itself of a revenue generating portion of its telecommunications business, it continues to pay Universal Service contributions on those revenues. This holds true whether the carrier sells a portion of its business or simply ceases operations of a business unit.

through must be significantly higher than the costs that those carriers with increasing revenues will incur and that will be passed through to consumers.

Thus, when a company like Oncor is required to contribute to Universal Service this year based on revenue levels of last year, an unreasonably high portion of this year's revenues will go to support Universal Service. For carriers in this situation, there are only two alternatives: either suffer a reduction in net revenues and quite possibly, elimination of profitability, or increase consumer charges as needed to compensate for the disproportionately high Universal Service contributions based on revenues earned in past periods.⁷ Neither of these alternatives is in the interests of these carriers or their customers and therefore are not in the public interest.

The financial crisis described in NTC's petition clearly shows that carriers with declining revenues are not unique and that there may be various circumstances which cause carriers to experience such revenue declines from year to year. Irrespective of the specific reasons for any carrier's revenue decline, the substantial harm to those carriers and ultimately to their consumers in the form of higher charges for service constitutes good cause to warrant a partial waiver pursuant to Section 1.3 of the Commission's rules.

⁷Imposition of a disproportionate percentage of a carrier's revenues to support Universal Service funding also is inconsistent with the principle of cost causation that long has been a hallmark of Commission cost allocation policy. Since there is no opportunity for a carrier to recover its Universal Service contribution costs this year from the customers it served last year and who generated last year's revenues upon which this year's contribution is based, this year's customers will bear the carrier's cost that resulted from last year's customers. This is especially true in a casual calling market like, *e.g.*, operator-assisted calling from public telephones.

While Oncor does not herein comment specifically on whether NTC should be granted its requested relief, NTC's petition clearly demonstrates the harm that the Commission's current method of calculating Universal Service contributions is creating for certain carriers experiencing declining revenues. Furthermore, this harm highlights the need for the Commission to modify its current calculation methodology.

Recognizing that it is inevitable that some "contribution lag" will result in any system that bases contributions on revenues generated in previous periods, Oncor proposed in its May 15 comments a solution to the current inequity, which will modify the existing system to one where carriers pay estimated contributions subject to an annual reconciliation or true-up. Such a system would be similar to the current Internal Revenue Service procedures for paying estimated income taxes.

Under the current system, carriers report actual revenues twice a year, once in September, and again in March of the next year. The September worksheet includes actual revenues for the period January 1 - June 30 of the same year. The March worksheet includes actual revenues for the entire prior year. Oncor proposes that carriers report both actual revenues for past periods, but also estimated revenues for the upcoming half year. The Commission or the Universal Service Administrator should then calculate the carrier's contribution based on the carrier's estimated revenues for the current year. This will allow carriers experiencing declining revenues to match contributions that must be paid to the fund administrator with the revenue on which the contributions are based. To ensure that the carrier is not under reporting its estimated revenues in an attempt to improperly reduce its

contributions, the Commission or the USF Administrator may compare the carrier's March worksheets year to year and reconcile the contributions paid based on the estimates with the contributions that should be paid on the carrier's actual revenue. This method of calculation would eliminate the harm that carriers such as Oncor and NTC are experiencing.

In addition, such a modification is necessary for the Commission to meet its statutory mandate that contributions to the Universal Service Fund be made by carriers "on an equitable and nondiscriminatory basis" as required by Section 254(d) of the Communications Act of 1934, as amended,⁸ and to conform with the Universal Service principle of competitive neutrality established by the Commission upon the recommendation of the Federal-State Joint Board in CC Docket No. 96-45.⁹ The current calculation method used by the Commission is neither equitable nor nondiscriminatory. Under the current calculation method, carriers with increasing revenues actually pay into the Universal Service Fund a lower percentage of their current revenues than do carriers with declining revenues. This is neither equitable nor nondiscriminatory as it places a heavier burden on certain carriers -- carriers with declining revenue that have the least ability to shoulder the extra costs. Neither is the current system competitively neutral since it affords a clear competitive advantage to those carriers enjoying year-to-year growth over those carriers whose revenue streams are stagnant or declining.

⁸47 U.S.C. § 254(b)(4) and (d).

⁹Federal-State Joint Board on Universal Service (Report and Order), 12 FCC Rcd 8776 (1997), at ¶ 21.

CONCLUSION

Wherefore, Oncor respectfully requests a waiver of the necessary Commission rules, policies and procedures, including any applicable procedures and formulas of the Universal Service Administrator, for calculation of its Universal Service contributions so that the revenue base to which the contribution factor is applied may be adjusted to more accurately reflect its current revenue level. Furthermore, Oncor urges the Commission to consider the impact of the current contribution methods on those telecommunications carriers that serve declining market segments and that are not enjoying the growth in traffic and revenues being experienced by carriers serving growing market segments, and to adopt the alternative contribution method described above.

Respectfully submitted,

OPERATOR COMMUNICATIONS, INC.
D/B/A ONCOR COMMUNICATIONS, INC.



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July 14, 1998

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CERTIFICATE OF SERVICE

I, Melodie Kate, a secretary in the law firm of Fleischman & Walsh, L.L.P., certify that I have this 14th day of July, 1998, caused to be sent by first-class mail, a copy of the foregoing Emergency Petition for Partial Waiver and Comments in Response to National Telephone & Communications, Inc.'s Request for Partial Waiver to the following:

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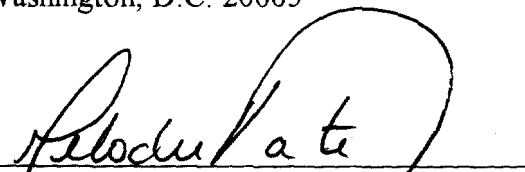
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